Supreme Court, U.S.
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No. 94-1530

In The

Supreme Court of the United States

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner

v.

ANTHONY A. PETRARCA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

Whether an order of a District Court remanding on jurisdictional grounds a case which had been removed under 28 U.S.C. § 1446 is reviewable by the Court of Appeals.[1]

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[1]Plaintiff-Respondent Petrarca has restated the Question Presented for Review based upon Petrarca's position, as set forth in greater detail infra, that by not appealing from Bankruptcy Judge Harold White's holding that the "bankruptcy removal" was not timely, Petitioner has waived its right to seek further review of that issue even if the District Court remand Order is appealable. Further, it is Petrarca's position that given the statutory language of §§ 1447 and 1452, this case was clearly remanded on jurisdictional grounds under § 1447 and not under § 1452 as Petitioner contends.

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STATUTES INVOLVED IN THE CASE

Respondent, Anthony A. Petrarca, recites here only 28 U.S.C. § 1446, not included by Petitioner in this section of the Petition for Writ of Certiorari, although Petitioner did recite in their entirety the other Statutes involved in the case 28 U.S.C. §§ 1447 and 1452.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal persecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be

filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosection shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that

a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants

shall give written notice thereof, to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such

cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

STATEMENT OF THE CASE

Plaintiff-Respondent Anthony A. Petrarca (hereinafter "Petrarca") commenced this action by filing his Complaint in the Summit County, Ohio Court of Common Pleas on March 18, 1992. Petrarca's Complaint named Child World, Inc. (hereinafter "Child World") and Cole National Corporation (hereinafter "Cole") as Defendants. Petrarca's Complaint sets forth four counts. The first count is a claim against Child World as lessee and Cole as guarantor for delinquent rents, unpaid common area maintenance costs, taxes, insurance, and late fees relative to a lease between Petrarca and Child World, for a Child World Store in Denver, Colorado. The second count is a claim against Child World as lessee, and Cole as guarantor for future rents pursuant to that Denver lease which had accelerated as a result of the default. The third and fourth counts assert claims against Child World only and are not involved in this appeal.

On April 14, 1992, Things Remembered, Inc. (hereinafter "TRI"), a non-party to the action, in contravention of the Ohio Rules of Civil Procedure, purported to enter into the case "as a successor by merger to Defendant Cole National Corporation" and took an automatic Leave to Plead for twenty-one (21) days up through and including May 11, 1992, purportedly pursuant to Summit County Local Rules of Court.

On May 6, 1992, Child World filed petitions pursuant to Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the Southern District of New York, the same being Case No. 92B20887.

On May 11, 1992, Child World filed with the Summit County Court of Common Pleas a suggestion of stay in this action, and on May 22, 1992, the Honorable Ted Schneiderman entered an Order ordering that the case be transferred to the inactive docket as to Child World only subject to reinstatement at such time as the court has been notified that the bankruptcy stay Order has been removed.

The case proceeded against Cole and against TRI. TRI filed an Answer on May 28, 1992. In its Answer TRI did not assert as an affirmative Defense or otherwise that this case should properly be in Federal Court. Next, TRI noticed and took two depositions, one of a non-party witness to this action and one of Plaintiff Petrarca.

On June 26, 1992, TRI filed its Amended Answer and Counterclaims in the Court of Common Pleas, Summit County, Ohio. TRI asserted not only Counterclaims against Plaintiff Petrarca but also joined an additional Counterclaim Defendant Colfax Manor Gardens, previously not a party to the action, and asserted purely permissive Counterclaims against Colfax Manor Gardens. TRI asserted in its Counterclaim four (4) counts for declaratory judgment raising issues which were virtually identical to those raised by Petrarca's original Complaint but relating to four (4) additional Child World stores and leases between Petrarca and Child World and Cole guaranties of those leases. Obviously, TRI made no

reference in its Amended Answer and Counterclaims to the fact that it believed this action should properly be in Federal Court.

The parties proceeded with discovery until on August 28, 1992, Petrarca filed his First Amended Complaint bringing five (5) additional guaranty claims against TRI and Cole again raising the identical issues previously raised by Petrarca's original Complaint and also subsequently raised by TRI's Counterclaim. Two (2) of the properties which are the subject of Petrarca's First Amended Complaint had previously been placed in issue by TRI's Counterclaim. These are the Manheim, Pennsylvania property and the Westland, Michigan property.

On or about September 15, 1992, TRI filed in the Court of Common Pleas, Cuyahoga County, Ohio a separate Complaint for declaratory relief against Anthony A. Petrarca and other Defendants seeking declaratory judgment upon two (2) additional Cole guaranties of Child World leases raising issues similar to, although not identical to, the issues raised in this litigation but as to still

two (2) additional properties (hereinafter "TRI vs. BGTV"). Again, obviously, TRI did not assert in its Complaint in TRI vs. BGTV filed in Cuyahoga County Common Pleas Court that those claims are properly raised and litigated only in Federal Court.

On or about September 25, 1992, TRI improperly filed its Notice of Removed Action in the Court of Common Pleas, Summit County, Ohio, indicating that the case had been removed to the United States District Court, Northern District of Ohio and indicating further that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).** On or about the same day, TRI filed in the United States District Court for the Northern District of Ohio and in the United States Bankruptcy Court for the Northern District of Ohio two (2) separate Notices of Removal indicating that the case had been removed pursuant to 28 U.S.C. §§ 1331, 1334(b), 1441, 1446, 1452 and Bankruptcy Rule 9027.

On or about October 5, 1992, before the two (2) removals were consolidated, TRI filed only in the District Court a

Motion to Dismiss Petrarca's First Amended Complaint.

On October 23, 1992, Petrarca filed in District Court a Motion to Remand and Motion for Costs. Petrarca subsequently filed a virtually identical Motion in the Bankruptcy Court.

On October 29, 1992, Petrarca filed only in District Court a Motion to Stay Proceedings on the Motion to Dismiss asking Judge Ann Aldrich to rule first on Petrarca's Motion to Remand. Petrarca also filed a Brief in Opposition to TRI's Motion to Dismiss.

TRI filed both in the District Court and in the Bankruptcy Court Memoranda in Opposition to Petrarca's Motions to Remand, and then on December 17, 1992, TRI filed only in the Bankruptcy Court a Motion to Transfer Venue and a Memorandum in Support requesting the Bankruptcy Court to transfer venue of this case to the United States Bankruptcy Court for the Southern District of New York. Petrarca filed a Brief in Opposition and TRI filed a Reply Memorandum.

On June 25, 1993, Judge Harold F. White of the United States Bankruptcy

Court for the Northern District of Ohio entered his Memorandum of Decision on Motion to Remand and Motion to Transfer Venue. Judge White found and held that TRI's removal to the District Court under the general removal statute, 28 U.S.C. § 1446, was proper. However, Judge White also found and held "that the removal to [the bankruptcy] court was untimely." Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, June 25, 1993, at 6, See Appendix C at p. 20a.

Petrarca timely appealed to the United States District Court. **TRI did not appeal from any aspect of Judge White's decision.** Upon consideration of Petrarca's appeal, the District Court, Judge Sam Bell, reversed. Relative to the federal question removal, Judge Bell held that the September 25, 1992, Notice of Removal "was plainly [outside of] the thirty day period for removal provided by § 1446(b)." Order of August 11, 1994, See Appendix C at p. 50a[2]. Judge Bell

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[2]Citations to Appendices are citations to the Appendices contained in the 6 1/8 x 9 1/4 inch version of Petitioner's Petition for Writ of Certiorari.

then went on to affirm the Bankruptcy Court's holding that TRI had failed to timely remove the case under the bankruptcy removal provisions of 28 U.S.C. § 1452 and Bankruptcy Rule 9027.

The District Court reversed the Order of the Bankruptcy Court only insofar as the Bankruptcy Court had held that TRI's removal under the general removal statute was proper. The District Court remanded the case to the Bankruptcy Court for further proceedings consistent with the District Court Order.

TRI appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit ordered TRI to show cause why the appeal should not be dismissed since, "[a]s a general rule, an order remanding an action to a state court from which is (sic) was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§ 1447(d) and 1452(b); * * * [Citations omitted.] * * * It does not appear, therefore, that the order of the district court is an appealable order." Order, September 29, 1994, at 1, See Appendix D at p. 61a. The parties briefed the show cause Order, and the

Sixth Circuit then dismissed the appeal. The Sixth Circuit held: "The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time required by 28 U.S.C. § 1446(b). Thus, Section 1447(d) prohibits review of that ruling. [Citations omitted.]" Order, November 15, 1994, at 2, See Appendix A at pp. 2a - 3a. Relative to the bankruptcy removal, the Sixth Circuit held: "In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. [Citations omitted.]" Order, November 15, 1994, at 2, See Appendix A, at p. 3a.

TRI then petitioned the Sixth Circuit for rehearing and rehearing en banc. In response, the Sixth Circuit entered an Order concluding "that the issues raised in the petition were fully considered upon the original submission and decision of the case." Order, January 12, 1995, at 1, See Appendix B, p. 7a.

On January 20, 1995, TRI filed as Plaintiff in state court in Denver, Colorado, a declaratory judgment action seeking a declaration by the Colorado state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to the very same Denver Child World guaranty which was the subject of Petrarca's original Complaint but which TRI disingenuously argues here must be litigated in the federal court system.

On March 10, 1995, TRI filed its Petition for a Writ of Certiorari in this Court.

On March 15, 1995, TRI filed as Plaintiff in state court in Lancaster, Pennsylvania, an Action for Declaratory Judgment seeking a declaration by the Pennsylvania state court of the rights and liabilities of TRI, Petrarca, and three (3) other party defendants relative to a guaranty of the tenant's obligations under a lease of a Child World store in Manheim Township, Pennsylvania. That Manheim Child World guaranty had been originally placed in issue **in the Summit County, Ohio litigation by TRI** in the

Second Claim of its Counterclaim filed June 26, 1992. Petrarca also placed the Manheim Child World guaranty in issue in Counts Seven and Eight of his First Amended Complaint filed August 28, 1992. These two counts were improperly included in TRI's removals. As with the Denver guaranty, TRI disingenuously argues to this Court that the Manheim guaranty must be litigated in Federal Court, while at the same time TRI is commencing and pursuing a declaratory judgment action on that guaranty in state court in Pennsylvania.

SUMMARY OF THE ARGUMENT

This Court should deny TRI's Petition for the following five reasons.

First of all, TRI waived the right to assert the argument it intends to assert if this Court grants the Petition when TRI failed to appeal the Bankruptcy Court Order which held, in part, that TRI had failed to timely remove this case under the bankruptcy removal statute. Additionally, TRI has waived its right to argue that the issues to be litigated between Petrarca and TRI ought to be litigated in Bankruptcy Court as a result of TRI's commencement of two separate state court actions wherein TRI seeks declaratory judgments on the very same issues which it contends must be litigated in Federal Bankruptcy Court.

Secondly, since a remand under the bankruptcy statute may only be on equitable grounds, and since this remand was on jurisdictional grounds, this remand which TRI contests was clearly not under the bankruptcy statute but, rather, was under the general removal and remand provision.

Third, in Daleske v. Fairfield Communities, Inc., ___ U.S. ___, 128 L.Ed. 2d 461, 114 S.Ct. 1832 (1994), this Court recently denied a Petition for Writ of Certiorari in a case seeking a review of issues which are similar to, if not identical to, those issues presented by Petitioner TRI in this case.

The cases which TRI contends support its interpretation of 28 U.S.C. § 1452(b) are sufficiently distinguishable from the instant case or simply do not support Petitioner's position. Therefore, the conflict between the Circuits which TRI perceives does not in fact exist and is not a basis for this Court to grant Certiorari.

Finally, this Court should deny the Petition for the reason that there is already existing authority from this Court deciding the issue framed by Petitioner. United States v. Rice, 327 U.S. 742 (1946), Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977), and Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976), all hold that cases remanded on

grounds permitted within 28 U.S.C. § 1447 are not reviewable on appeal or otherwise.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DENY TRI'S PETITION BECAUSE WHEN TRI FAILED TO APPEAL THE BANKRUPTCY COURT ORDER, TRI WAIVED THE ARGUMENT IT INTENDS TO ASSERT IF THIS COURT GRANTS THE PETITION.

This Court and other federal appellate courts have long recognized the proposition that this Court is without jurisdiction to consider an argument not raised in the court below. Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); and Michel v. Louisiana, 350 U.S. 91 (1955).

In this case, it is clear from the record of each court in which this case has proceeded that TRI attempted to remove this action both under the general removal statute, 28 U.S.C. § 1446, and under the bankruptcy removal statute, 28 U.S.C. § 1452. In fact, the Notice of

Removed Action filed in the Summit County Court of Common Pleas indicated that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).** The Bankruptcy Court held that TRI had failed to timely remove this case under the bankruptcy removal statute but that TRI had timely removed the case under the general removal statute. **TRI did not appeal any aspect of that ruling of the Bankruptcy Court.** Because the bankruptcy judge ordered the case transferred to the United States Bankruptcy Court for the Southern District of New York, Petrarca did appeal the Bankruptcy Court's holding that the case was properly removed under the general removal statute. Now, despite TRI's reliance upon the Bankruptcy Court's holding that it had properly removed the case under the general removal statute, and despite TRI's failure to appeal Judge White's holding that TRI had failed to properly remove the case under the bankruptcy removal statute, TRI desires to have this Court accept jurisdiction over the question of whether or not an appeal of an Order remanding a case removed under the 28

U.S.C. § 1452 is barred where the remand order is based on jurisdictional grounds. Since Petrarca appealed the Bankruptcy Court's holding that the case had been properly removed under the general removal provisions, the District Court's Order, in effect, only reversed that portion of the Bankruptcy Court Order and remanded the case under the provisions of 28 U.S.C. § 1447(d) which reads:

> An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1447(d) does not include the language which TRI asks this Court to examine and which is contained in 28 U.S.C. § 1452. TRI's argument is misdirected since this case was not remanded under § 1452. TRI failed to appeal the Bankruptcy Court's earlier holding that the bankruptcy removal was not timely. Therefore, TRI waived its right to appeal that question here.

TRI has also waived its right to argue that these issues as between Petrarca and TRI ought to, and can only, be litigated in Bankruptcy Court as a result of TRI's most recent conduct in commencing two (2) separate state court actions as plaintiff seeking to litigate in state court the very same issues which are the subject of TRI's appeal to the Sixth Circuit and of this Petition.

In this regard, not only has TRI waived its right to assert that these issues ought to, and can only, be litigated in Bankruptcy Court. The question which TRI asks this Court to decide is now moot as a result of TRI's conduct in commencing state court actions in Colorado and in Pennsylvania on these very same issues.

Federal Courts are prohibited from deciding moot questions. There must be an actual case or controversy between the parties at the time the issue is reviewed. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), reh. den. 300 U.S. 687 (1937); North Carolina v. Rice, 404 U.S. 244 (1971). "[M]oot questions require no answer." Missouri,

Kansas & Texas R. Co. v. Ferris, 179 U.S. 602, 606 (1900). Further, this Court may refuse to consider unnecessary questions. Mercer v. Theriot, 377 U.S. 152 (1964), reh. den. 377 U.S. 973 (1964).

In this case, as a result of TRI's voluntary choice to pursue state court remedies on those issues it had previously argued must be litigated in Bankruptcy Court, the issues are moot and it is unnecessary for this Court to decide the issue presented by Petitioner TRI.

II. THIS COURT SHOULD DENY TRI'S PETITION SINCE THE REMAND CLEARLY WAS NOT "ON EQUITABLE GROUNDS" AND IS THEREFORE CLEARLY NOT "AN ORDER ENTERED UNDER 28 U.S.C. § 1452(b)."

The remand provision in § 1452(b) is limited to discretionary remands based upon equitable grounds. The statute reads: "The Court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." (Emphasis added.) If

§ 1452(b) were the only statute to apply under circumstances such as those presented by this case, there would be no requirement that cases removed under § 1452(a) be remanded on the purely legal ground that the District Court lacks subject matter jurisdiction over the case. Since § 1447(c) requires remand in cases where the District Court lacks subject matter jurisdiction, § 1447 and § 1452 cover different situations and must both be given effect. For this reason as well, it is clear that the District Court remanded this case under the provisions of § 1447 and not under the provisions of § 1452. Therefore, Sub-Section 1447(d) governs this remand Order, and the Order is not reviewable on appeal or otherwise under any circumstances. Therefore, this Honorable Court should deny the Petition.

III. THIS COURT SHOULD DENY TRI'S PETITION SINCE IT HAS RECENTLY REFUSED TO GRANT A PETITION FOR WRIT OF CERTIORARI SEEKING REVIEW OF ISSUES SIMILAR TO, IF NOT IDENTICAL TO, THOSE ISSUES PRESENTED IN THIS CASE.

This Court recently rejected a Petition for Writ of Certiorari in another case which sought review of issues similar to, if not identical to, those presented by Petitioner in this case.

In Daleske v. Fairfield Communities, Inc., 17 F.3d 321 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held, as argued by this respondent above, as follows:

> Moreover, the remand provision in section 1452(b) is limited to discretionary remands based on equitable grounds. If this were the only statute to apply, there would be no requirement that cases removed under § 1452(a) be remanded on the purely legal ground that the district court lacks subject matter jurisdiction. Because § 1447(c) requires such a remand, the statutes cover different contingencies, and should both be given effect. For these reasons, the provisions of 28 U.S.C. § 1447(c) apply to cases removed under § 1452(a) as well.

Id., at 324.

After the Tenth Circuit affirmed the Colorado District Court holding, appellants filed a Petition for Writ of Certiorari which this Court denied. Daleske v. Fairfield Communities, Inc.,

___ U.S. ___, 128 L.Ed. 2d 461, 114 S.Ct. 1832 (1994).

This Court has recently decided that the issue presented by Petitioner is not so significant as to require grant of a Petition for Writ of Certiorari.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE THE CONFLICT IN THE CIRCUITS WHICH TRI PERCEIVES DOES NOT IN FACT EXIST.

TRI cites this Court to four cases which it argues support its position that remands under § 1452(b) on grounds other than equitable grounds are in fact reviewable. Those cases are Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984); In re: National Developers, Inc. 803 F.2d 616 (11th Cir. 1986); Browning v. Navarro, 743 F.2d 1069 (5th Cir. 1984); and National City Bank v. Coopers and Lybrand, 802 F.2d 990 (8th Cir. 1986). For the reasons described below, each of these cases is sufficiently distinguishable from the instant case and the cases presented by TRI as on the other side of the "conflict" such that

there is in fact no conflict among the Circuits as argued by TRI.

Pacor, supra, was removed and ordered remanded under the bankruptcy removal statute only, 28 U.S.C. § 1478 which became 28 U.S.C. § 1452 under the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pacor was not removed or remanded under the general removal statute.

In re: National Developers, Inc., supra, similarly was removed only under the bankruptcy removal statute and not under the general removal statute. The Eleventh Circuit also found it significant that the case had been removed from a state court in the territory covered by the Southern District of New York to the Bankruptcy Court for the Middle District of Alabama. The Court of Appeals therefore found that it was not a properly removed action and therefore non-reviewability did not apply. The Court cited Browning v. Navarro, supra, and Pacor, Inc. v. Higgins, supra, for this proposition.

TRI cites National City Bank v. Coopers and Lybrand, for the proposition

that the Eighth Circuit accepted appellate jurisdiction over the remand of a bankruptcy removal even though the Court had declined to hear the appeal of a remand Order based on lack of federal question jurisdiction under § 1331. Since the Eighth Circuit found that the remand Order was not reviewable to the extent that it was based on a lack of federal question jurisdiction, the opinion in National City Bank v. Coopers and Lybrand is supportive of Petrarca's position. In this case, the District Court found that both the general removal and the bankruptcy removal were not timely. Therefore, under neither method of removal did the Federal Court have jurisdiction over this action.

Finally, Browning v. Navarro, supra, also does not support Petitioner's position. While Browning does contain a long footnote containing a thorough discussion of reviewability of remand Orders, that footnote is merely dicta since the issue before the appellate court in Browning was whether or not the parties had complied with an earlier Bankruptcy Court remand Order.

Again, for all of the foregoing reasons, the conflict between the Circuits which Petitioner perceives does not in fact exist. The cases presented by Petitioner in support of its position relative to interpretation of 28 U.S.C. § 1452(b) are either distinguishable or simply do not in fact support TRI's interpretation of § 1452.

V. THIS COURT SHOULD DENY THE PETITION FOR THE REASON THAT THERE IS ALREADY EXISTING UNITED STATES SUPREME COURT CASE LAW DECIDING THE ISSUE FRAMED BY PETITIONER.

There are numerous decisions of this Court which confirm the rule that cases remanded when the District Court determines that the case was removed improvidently or that the District Court is without jurisdiction over the case are not reviewable by the Court of Appeals. This line of cases starts at least with United States v. Rice, 327 U.S. 742 (1946). More recently, this Court has decided Thermtron Products, Inc. v.

Hermansdorfer, 423 U.S. 336 (1976), Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977), and Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976).

In Thermtron, this Court held that § 1447(d) does not bar appellate review by mandamus of a remand Order which is made on grounds which are not specified in § 1447(c), but in doing so also re-emphasized the rule that cases remanded on grounds permitted within the statute are not reviewable.

Gravitt reversed a Court of Appeals Order which, by mandamus, had ordered a District Court to vacate its remand Order because the District Court had employed erroneous principles in concluding that it was without jurisdiction. This Court again confirmed the rule that the remand Order was not reviewable, holding:

> The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, is not to the contrary, for there the District Court remanded 'on grounds wholly different from those upon which § 1447(c) permits

> remand.' Id., at 344. Thermtron did not question but re-emphasized the rule that § 1447(c) remands are not reviewable.

430 U.S. 723, at 723-724.

Finally, in Volvo, upon an application for a stay of a District Court Order pursuant to 28 U.S.C. § 1447(c) remanding an alleged diversity class action to state court on the ground that the District Court had no jurisdiction of the action, Justice Rehnquist denied the application for stay holding that appellate review of a remand Order based on § 1447(c), whether erroneous or not, is barred by § 1447(d).

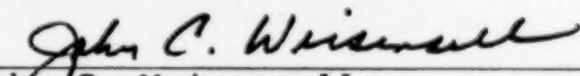
Again, since in this case Petitioner removed this action **both** under the general removal provisions **and** under the bankruptcy removal provisions, this case must be governed by not only the bankruptcy removal provisions but also the general removal provisions, including § 1447(d) and this Court's existing case law interpreting that section. Therefore, there is existing case law from this Court which is dispositive of the question presented by Petitioner, and

on that basis, this Court should deny this Petition.

CONCLUSION

For all of the reasons set forth above, this Court should deny Petitioner, Things Remembered, Inc.'s Petition for Writ of Certiorari and refuse to review the Sixth Circuit Court of Appeals' Order which, in turn, refused to review the District Court's Order remanding this case to the Bankruptcy Court with instructions to remand this case to state court consistent with the District Court Opinion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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In compliance with Rule 29.5, all parties required to be served have been served.